IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.38 OF 2004

M/s.Tanna & Co. .. Appellant.
V/s.
Income Tax Officer,
Ward - 25(3)(4), Mumbai .. Respondent.

Mr.K. Gopal for the appellant.

CORAM : R.M. LODHA, &
J.P. DEVADHAR, JJ.

DATED : 24TH NOVEMBER, 2004.

P.C. :

Heard Mr.K. Gopal, the learned counsel for the appellant-assessee.

2. The Tribunal in its order observed thus :

> ". We find that the agreement to sell dated 18/12/1994 executed between the assessee and seller Shri P. D'Souza was found as a result of search operations carried out on the premises of Shri P. D'Souza and the assessee. The rectification deed dated 6/1/1995 said to have been executed prior to the date of search, was not found at the time of search at the premises of the assessee or Shri P. D'Souza. We find that on page 42 of the diary of Shri P. D'Souza, found and seized by the department at the time of search, the amount received as 'On Money' from the assessee alongwith the date of receipt thereof have been recorded. Shri P.D'Souza in his statement recorded at the time of search u/s.132(4) of the Act has admitted the receipt of 'On Money' amounting to Rs.26,51,850/-. We

find that the statement recorded u/s.132(4) of Shri P. D'Souza has not been retracted by him hereafter. In these facts it cannot be said that the notings in the diary are not corroborated with any evidence brought on record. The notings in the diary are corroborated by the agreement to sell dated 18/12/1994 executed between the assessee and Shri P. D'Souza and also by the statement on oath of Shri P. D'Souza recorded by the revenue authorities u/s.132(4) of the Act. In these facts we hold that the rates of land in the area as per chart of sub-Registrar, Mangalore is of no help to the case of the assessee. We find that the assessee never asked for the cross-examination of Shri P. D'Souza. We find that ample opportunity was provided to the assessee to explain its case by the Assessing Officer. The loose papers and diary found at the time of search were confronted to the assessee. We find no substance in the argument of the assessee that the same amount has been taxed twice once in the hands of Shri P. D'Souza and the next on the assessee, for the reason that Shri P. D'Souza has been taxed for different purpose of capital gains whereas the assessee has been taxed for the payment of 'On Money' in cash not recorded in the books of accounts. We find that there is no evidence on record to suggest that the assessee was made to believe at the time of execution of agreement to sell on 18/10/94 that the plot of land can be mainly used for construction of commercial complex. The term No.7 of the agreement to sell dated 18/10/1994 shows that the assessee was well aware that residential flats would be constructed on the land in question. We find that even after the execution of rectification deed dated 6/1/1995, the seller Shri P. D'Souza has received of amounts 'On Money' in cash. There is sufficient evidence on record to hold that the assessee has paid 'On Money' of Rs.26,51,850/- in cash to Shri P. D'Souza, in the form of notings in diary and loose papers of Shri P. D'Souza seized by the department and also the agreement to sell executed on 18/10/94

between the assessee and Shri P. D'Souza and also the statement on oath of Shri P. D'Souza recorded at the time of search u/s.132(4) of the Act."

3. The findings are concluded on facts based on proper appreciation of the material.

4. No substantial question of law arises in this appeal. The appeal is dismissed in limine.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)